STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal From the Michigan Court of Appeals
Honorable Bill S. Scheutte, Presiding

HARTMAN & EICHHORN BUILDING CO., INC., a Michigan Corporation,
Plaintiff/Counter-Defendant,

v

STEVEN DAILEY and **JANINE DAILEY,** his wife, and **ABN-AMRO d.b.a. STANDARD FEDERAL BANK,** Jointly and Severally,
Defendants.

And

STEVEN DAILEY and **JANINE DAILEY,**
Counter-Plaintiffs/Third-Party Plaintiffs/ Appellees,

v

JEFFRY R. HARTMAN, an individual,
Third-Party Defendant/Appellant.

Supreme Court No. 129733

Court of Appeals No. 249847

Oakland County Circuit Court No. 01-032203-CK

And

ARTHUR Y. LISS and **BEVERLY LISS,**
Plaintiffs/Appellees,

v

LEWISTON-RICHARDS, INC., a Michigan Corporation and **JASON P. LEWISTON,**
Defendants/Appellants

And

LEWISTON-RICHARDS, INC.,
Counter-Plaintiff,

v

ARTHUR Y. LISS and **BEVERLY LISS**
Counter-Defendant

Supreme Court No. 130064

Court of Appeals No. 266326

Oakland County Circuit Court No. 03-046587-CK

BRIEF *AMICI CURIAE* IN SUPPORT OF APPELLEES, STEVEN AND JANINE DAILEY, AND ARTHUR Y. AND BEVERLY LISS, BY THE STATE BAR OF MICHIGAN CONSUMER LAW SECTION COUNCIL, AARP, MICHIGAN CONSUMER FEDERATION, NATIONAL CONSUMER LAW CENTER, AND CENTER FOR CIVIL JUSTICE

GARY M. VICTOR (P24145)
Attorney for Amicus Curiae,
State Bar of Michigan Consumer Law Section; AARP, Michigan Consumer Federation; National Consumer Law Center; Center for Civil Justice
4928 Cole Blvd.
Ypsilanti, MI 48197
734-434-7278

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **Page**

STATUTES

TREATISES AND OTHER AUTHORITIES

STATEMENT OF JURISDICTION

Appellant has filed a Statement of Jurisdiction contending this Court has jurisdiction pursuant to MCR 7.301(A)(2). Appellees have filed a statement agreeing with Appellant's statement of jurisdiction, but disagreeing with Appellant's request for relief.

STATEMENT OF QUESTION PRESENTED

I. Does the Michigan Consumer Protection Act's Section 4 MCL 445.904(1)(a) exempt licensed residential builders and contractors from liability under the Act?

The Trial Court did not address this question, but proceeded on the basis that the answer is NO.

The Court of Appeals answered this question NO.

Appellees answer this question NO.

Appellant answer this question YES.

INTRODUCTION

MCL 445.904(1)(a) of the Michigan Consumer Protection Act, MCL 445.901, *et seq.* (MCPA) provides, in pertinent part:

> (1) This act does not apply to . . . the following:
>
> (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority or of the United States.

In *Smith v Globe Life Insurance Co.*, 460 Mich 446; 597 NW2d 28 (1999) this Court found a "general" exemption for the insurance industry by interpreting section 4(1)(a) as follows:

> . . .Contrary to the "common-sense reading" of this provision by the Court of Appeals, **we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited**. (emphasis added.) 460 Mich at 465.

Although the *Smith* Court acknowledged that the insurance industry is not like most businesses,[1] several lower courts have cited *Smith* as the basis for totally exempting other types of businesses from the MCPA. This appeal provides the Court with an opportunity to reexamine *Smith's* holding. The sole purpose of this Amici Curiae brief is to assist the Court in making its evaluation regarding the scope of this exemption section of the MCPA. Amici hope that this brief will better enable the Court to make an informed decision.

Toward that end, the brief will examine the history of the MCPA in general as well as section 4(1)(a) in particular. The relationship between *Smith* and *Attorney General v Diamond Mortgage Co,* 414 Mich 603; 327 N.W.2d 805 (1982) will be examined. An analysis of the *Smith* decision in terms of the accepted rules of statutory construction will be made and the economic

[1] 460 Mich at 466, fn 12.

effect of broadening exemptions to the MCPA will be discussed. Amici urge the Court to conclude that the holding in *Smith* should be discarded and the narrower interpretation of *Diamond Mortgage* readopted. In the alternative, if the Court is not so persuaded, Amici request that the Court limit the scope of *Smith* to the insurance industry, or at most, those few businesses intensively regulated in a manner similar to the insurance industry.

STATEMENT OF FACTS

Amici concur in the Statement of Facts submitted by Appellees, Steven and Janine Dailey, and Arthur Y. and Beverly Liss.

ARGUMENT

A. THE COURT SHOULD REEVALUATE *SMITH'S* READING OF SECTION 4(1)(a) AND RETURN TO THE NARROW INTERPRETATION OF *DIAMOND MORTGAGE*

1. THE HISTORY OF THE MCPA

The 1970s witnessed a flurry of legislative enactments expanding consumers' rights and remedies. In addition to the MCPA, enacted in 1976, these "consumer protection" statutes included, among others, the Landlord-Tenants Relationships Act, MCL 554.601, *et seq.* (regulating residential security deposits), the Motor Vehicle Service and Repair Act, MCL 257.1301, *et seq.* (regulating car repair facilities), the Truth in Renting Act, MCL 554.631, *et seq.* (regulating the terms of residential leases), and the Pricing and Advertising Act, MCL 445.351, *et seq.* (regulating the pricing and advertising of consumer goods). The MCPA was the crown jewel of these legislative efforts.

As originally enacted, the MCPA prohibited twenty-nine types of conduct as unfair, unconscionable or deceptive. MCL 445.903(1). The MCPA gives consumers a real opportunity to act as private attorneys general thereby protecting not only their own rights but those of the

public. A lone consumer can help eliminate an unfair or deceptive practice by obtaining injunctive relief. MCL 445.911(1)(b). The act offers injured consumers access to the court system by providing for reasonable attorneys' fees. MCL 445.911(2). Such individual suits both provide relief for injured consumers and motivate businesses to refrain from deceptive conduct by increasing the costs of these behaviors beyond the benefits derived. The MCPA also provides for class actions, enabling substantial groups of consumers to obtain relief from harm caused by unfair or deceptive practices. MCL 445.911(3). The act even provides for shifting the cost of class notice to defendants where the consumer can show a probability of success on the merits. MCL 445.911(5).

The enactment of the MCPA was a bipartisan effort. It was passed by a Legislature with a Democratic majority and signed by a Republican governor. It was also part of a national trend. During this period statutes prohibiting unfair and deceptive practices (UDAP statutes) were passed throughout the United States. There were several factors that contributed to this universal adoption of UDAP statutes. Among these was the recognition that life in the marketplace was becoming increasingly less personal and more complex. We no longer lived in small communities or cities made up of a multitude of small communities. Consumers could not rely on a merchant's honesty simply because deceptive behavior would become known throughout the community and the perpetrator shunned.

Also, the information required by consumers to make decisions regarding the purchase of goods or services was becoming more complex, while the technology available for making buying decisions was steadily evolving. Without full, honest disclosure, the consumer was at a distinct disadvantage in the marketplace. Compounding the consumer's vulnerability to unfair or deceptive practices was the absence of viable remedies. Even if an injured consumer could

utilize a common law remedy, without the availability of statutory attorneys' fees to compensate consumers for their legal costs, litigation was a losing proposition whether the consumer prevailed in court or not. On the other hand, consumers could find little solace with governmental agencies. The scope of their authority was insufficient to cover many of the myriad types of consumer complaints, and agency funding was such that they could usually concentrate on only the most egregious business practices.

Yet another important factor motivating the business community to sign on to the passage of the UDAP statutes was the recognition that prohibiting and punishing unfair or deceptive practices was in the best interests of honest business people. As long as merchants could obtain a competitive advantage by using unfair or deceptive means, honorable businesses suffer. Once the business community came to understand this situation, it accepted the necessity of consumer protection legislation even though it usually viewed governmental regulation as repugnant.

To the extent that *Smith* broadens the meaning of section 4(1)(a) of the MCPA and thereby allows businesses to engage in unfair or deceptive practices without fear of being subject to liability under the MCPA, it is inconsistent with the history and motivation behind the enactment of the statute. Broadening the exemption section means consumers will be deprived of the information they need to make informed purchasing decisions, more consumers will be victimized by unfair or deceptive practices, fewer injured consumers will have viable remedies, and more honest businesses will be put at a competitive disadvantage. To remedy these problems, this Court should return to *Diamond's* narrow construction of section 4(1)(a), whose history will be examined next.

2. THE HISTORY OF SECTION 4(1)(a)

Section 4(1)(a) was carefully crafted. As mentioned above, the original MCPA prohibited twenty-nine types of conduct as unfair or deceptive practices in trade or commerce and defined "trade or commerce" to include virtually every kind of business activity. MCL 445.902. Given the variety of types of conduct prohibited and the breadth of activity covered by the act, there was some chance, however small, that "a transaction or conduct specifically authorized" under one statute could arguably come within the meaning of one or more MCPA prohibitions. In such a case, it would put the merchant on the horns of a dilemma with the same transaction or conduct being specifically authorized by one statute potentially being a violation of the MCPA. Section 4(1)(a) was designed to avoid that conflict.[2]

The principal argument used against this narrow interpretation of section 4(1)(a) by MCPA defendants is that the Legislature would never specifically authorize unfair or deceptive conduct. While this may be true, the Legislature in a very few circumstances has specifically authorized a transaction or conduct one could argue is in violation of the MCPA. The most common example used to prove this point can be found in the Motor Vehicle Service and Repair Act, MCL 257.1301, *et seq.* (MVSRA).

---

[2] In *Skinner v Steele,* 730 SW2d 335, 337 (Tenn App 1987), the Tennessee Court of Appeals interpreted an almost identical section as follows:

> . . .The statutory exemption precludes the Attorney General and individual consumers from bringing an action based on practices that are "specifically authorized" under the insurance code, or under other regulatory statutes. . . The purpose of the exemption is to insure that a business is not subjected to a lawsuit under the Act when it does something required by law, or does something that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations. It is intended to avoid conflict between laws, not to exclude from the Act's coverage every activity that is authorized or regulated by another statute or agency.

The MVSRA regulates vehicle repair facilities and requires the use of written estimates. The written estimate section, MCL 257.1332(1), specifically authorizes repair facilities to charge "10% or $10.00, whichever is less" over a written estimate without obtaining "the written or oral consent of the customer. . . unless specifically requested by the customer." Charging any amount above a written estimate without obtaining the consent of the consumer could be argued to be in violation of several subsections of the MCPA.[3] As charging a certain amount in excess of a written estimate is "specifically authorized" under the MVSRA, a motor vehicle repair facility that engages in such "a transaction or conduct" is exempt from suit under the MCPA.

The first reported case to interpret section 4(1)(a) was *Attorney General v Michigan National Bank,* 110 Mich App 106, 312 NW2d 405 (1981). This case concerned defendant's change of accounting systems used to calculate the amount paid by mortgagors into mortgage escrow accounts. The Attorney General claimed that defendant's change of existing contracts violated the MCPA. Defendant claimed an exemption on the basis that the new accounting method was authorized by statute. The Court held defendant was not exempt because **its conduct** of changing existing contract provisions was not specifically authorized by statute.

The next case, and what should be the controlling case interpreting section 4(1)(a), was this Court's decision in *Attorney General v Diamond Mortgage*, 414 Mich 603, 327 NW2d 805 (1982). *Diamond* concerned whether real estate brokers were exempt from liability under the MCPA because they were subject to regulation under the Michigan Department of Licensing and Regulation. In holding that real estate brokers are subject to liability under the MCPA, the Court reasoned as follows:

> We agree with the plaintiff that Diamond's real estate broker's license does not exempt it from the Michigan Consumer Protection Act. **While the license generally authorizes Diamond to engage in the activities of a real estate**

[3] *See, e.g.,* MCL 445.903(1)(s), (bb) and (cc).

> **broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act,** nor transactions that result from that conduct. In so concluding, we disagree that the exemption of §4(1) becomes meaningless. **While defendants are correct in stating that no statute or regulatory agency specifically authorizes misrepresentations or false promises, the exemption will nevertheless apply where a party seeks to attach such labels to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."** 414 Mich at 617 (emphases added)

Diamond's analysis and holding are clear. Its interpretation of section 4(1)(a) was very narrow and followed the plain meaning of the statute's words: "[a] transaction or conduct specifically authorized." Under *Diamond*, only a single transaction or conduct specifically authorized by a statute could be exempt. Even so, a lower court found a way to, in effect, reverse *Diamond*. That case was *Kekel v Allstate Insurance Co.*, 144 Mich App 379, 375 NW2d 455 (1985).

Rather than interpreting section 4(1)(a) narrowly as *Diamond* had done, the *Kekel* Court interpreted the section very broadly. It accomplished this task by changing the words of the statute. The *Kekel* Court substituted the words "subject of regulatory control" for the statutory language "specifically authorized," stating:

> We first look to the exemption language of § 4(1)(a) to determine if plaintiffs' complaint speaks to a transaction or conduct which would be the **subject of regulatory control** "under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." (emphasis added) 144 Mich App at 383.

Where, under *Diamond*, only a very few transactions would be exempt from MCPA liability, under *Kekel's* interpretation virtually every regulated business would be exempt.

By substituting its own words for those of the Legislature, the *Kekel* Court clearly engaged in judicial legislating. It also erroneously attempted to distinguish *Diamond*, stating that this Court's interpretation was based solely on the fact that the conduct alleged to be in violation of the MCPA was outside the scope of defendant's real estate license. This "distinction" totally ignores the arguments of the parties set forth in *Diamond* and the reasoning of the Court.

Naturally, the *Kekel* decision led to a great deal of confusion. Its conflict with *Diamond* was obvious.[4] Some courts chose to follow *Kekel* while others relied on *Diamond.*

Next came this Court's decision in *Smith.* The *Smith* interpretation of section 4(1)(a) was something altogether new. Without explanation, the *Smith* Court concluded that in drafting section 4(1)(a) it was the intention of the Legislature "to include conduct the legality of which is in dispute." *Smith* at 465. There is nothing in the history or wording of the MCPA to warrant that conclusion. The *Smith* Court went on to create a new focus in determining exemptions under section 4(1)(a). *Id.* That inquiry is whether the "general transaction is specifically authorized by law." Under this new test, the Court found the entire insurance industry exempt under section 4(1)(a).[5]

There is no question that *Smith's* interpretation expanded the breadth of the MCPA's exemption. *Smith* itself terms section 4(1)(a) a "broad exemption." 460 Mich 466. The question presented here is how broad. Amici maintain that to whatever extent *Smith* expanded the MCPA exemption, such extension was inconsistent with the history of the act and the exemption section, its plain meaning, and its intended purpose. This Court is urged to reject *Smith's* broader interpretation of section 4(1)(a) and return to the narrow interpretation of *Diamond.* The relationship between *Smith* and *Diamond* is discussed next.

---

[4] In the words of one federal judge: "*Kekel* simply can not be reconciled with *Diamond Mortgage* in any principled manner." *Lawson v American Sec Ins Co*, No. 88-CV-10280-BC (ED Mich, 1989).

[5] The Court did find the insurance industry potentially subject to the MCPA under section (4)(2)(a). That section was subsequently repealed in an amendment which exempts the insurance industry from MCPA suit altogether. MCL 445.904(3).

3. THE REASONING OF *DIAMOND* AND *SMITH* CANNOT BE RECONCILED

Simply put, *Smith* and *Diamond* are incompatible. *Diamond* focused on whether the transaction or conduct alleged to be in violation of the MCPA is "specifically authorized" by another statute and created a very narrow exemption. 414 Mich at 616. *Smith*, on the other hand, inquires whether the general transactions of the industry are "specifically authorized." *Smith* held section "4(1)(a) generally provides that transactions or conduct 'specifically authorized' are exempt," 460 Mich 467, and created a "broad exemption" exempting the entire insurance industry.

Smith, rather than set out how it would distinguish its holding from that in *Diamond*, quotes *Kekel*. 460 Mich at 464. However, the *Kekel* Court misinterpreted both section 4(1)(a) and section 4(2). With respect to the former, it deleted the Legislature's words "specifically authorized" and substituted "subject of regulatory control"; as to the latter, it deleted the words "[e]xcept for the purposes of an action filed by a person under section 11."[6] In effect, Kekel dramatically revised the MCPA severely narrowing its scope. By following *Kekel* as a means of distinguishing *Diamond*, *Smith's* analysis on this issue is completely incorrect. An examination of *Diamond* will show that to be the case.

If read as a whole, *Diamond* unquestionably interpreted section 4(1)(a) as creating a narrow exemption applicable only where the particular conduct alleged to be in violation of the MCPA was specifically authorized by another statute. It is clear from *Diamond's* presentation of the relative positions of the parties and its reasoning that the Court adopted the Attorney General's narrow construction of the section. *Diamond* set forth the arguments of the parties and its analysis as follows:

---

[6] Even *Smith* acknowledges *Kekel's* construction of section 4(2) as erroneous. 460 Mich at 466.

The plaintiff, however, argues that § 4(1) of the Michigan Consumer Protection Act exempts only "[a] transaction or conduct *specifically authorized.*" He contends that a license to engage in an activity is not a basis for concluding that one is "specifically authorized" to employ deceptive practices in that activity. He states:

"If every person or business which engages in an activity authorized by some statute or regulation were exempt from the Michigan Consumer Protection Act, pursuant to § 4(1), then the Michigan Consumer Protection Act, would be a cruel hoax on the many legislators * * * and others who sought to give Michigan consumers protection in the marketplace. . . .

Defendants respond that to accept plaintiff's construction of § 4(1) would be to render the exemption meaningless. They assert:

"Obviously, there is no statute which specifically authorizes misrepresentations or false promises. . .Defendants argue that such a result is absurd.

We agree with the plaintiff that Diamond's real estate broker's license does not exempt it from the Michigan Consumer Protection Act. While **the license** generally authorizes Diamond to engage in the activities of a real estate broker, it **does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act**, nor transactions that result from that conduct. In so concluding, we disagree that the exemption of § 4(1) becomes meaningless. While defendants are correct in stating that no statute or regulatory agency specifically authorizes misrepresentations or false promises, **the exemption will nevertheless apply where a party seeks to attach such labels to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."** (emphases added) 414 Mich 616-617.

The focus of the Attorney General's position, and by accepting that position, the focus of *Diamond's* section 4(1)(a) inquiry is whether "**the conduct**" alleged to be in violation of the MCPA is specifically authorized by some other law. The exemption will apply only when a party attempts to attach the unfair, unconscionable or deceptive label to **"[a] transaction or conduct specifically authorized under"** another statute. The *Smith* Court's statement that "*Diamond Mortgage* instructs that the focus is on whether the transaction at issue, not the alleged misconduct, is 'specifically authorized,'" 460 Mich at 465, is simply incorrect.

Smith, in creating a "broad exemption" where *Diamond* created a very narrow one, is totally incompatible with *Diamond*; but it is more in harmony with *Kekel*. Even if limited to the insurance industry, or at most, those businesses subject to similarly rigorous regulation, *Smith's* "broad exemption" does mischief to the wording and purpose of the MCPA. If the *Smith* exemption is expanded to other less regulated industries, as has been the case in several lower court decisions, *Smith* will have created the "cruel hoax on the many legislators * * * and others who sought to give Michigan consumers protection in the marketplace" feared by the Attorney General in *Diamond*. Amici urge the Court to reevaluate *Smith's* analysis and return to the narrow exemption created by the statute itself as interpreted by *Diamond*. In further support of this position, this brief will next examine *Smith*'s analysis in relation to the rules of statutory construction.

4. THE *SMITH* HOLDING ON SECTION 4(1)(a) VIOLATES THE RULES OF STATUTORY CONSTRUCTION

Amici contend *Smith*'s interpretation of section 4(1)(a) is contrary to virtually every rule of statutory interpretation. The general principles of statutory construction are well settled. The primary rule of statutory construction is to determine and effectuate the intent of the Legislature through reasonable construction in consideration of the purpose of the statute and the object sought to be accomplished. *Frankenmuth Mut Ins v Marlette Homes, Inc,* 456 Mich 511, 515; 573 NW2d 611 (1998). The first step in that determination is to review the language of the statute itself. *In re MCI*, 460 Mich. 396, 411; 596 NW2d 164 (1999). Words of a statute must be given their plain and ordinary meaning. *Robinson v City of Detroit,* 462 Mich 439; 613 NW2d 307 (2000); *Hiltz v Phil's Quality Market*, 417 Mich 335, 343; 337 NW2d 237 (1983). If the plain and ordinary meaning of the statutory language is clear, then judicial construction is neither necessary nor permitted. *Lorencz v. Ford Motor Co*, 439 Mich. 370, 376; 483 NW2d 844

(1992). Every word in a statute should be given meaning, and the court should avoid a construction that would render any part of the statute surplusage or nugatory. *Wickens v Oakwood Healthcare System,* 465 Mich 53; 631 NW2d 686 (2001). Statutory provisions must also be read in the context of the entire statute so as to produce a harmonious whole. *People v Lounsbery,* 246 Mich App 500, 633 NW2d 434 (2001).

There are additional rules that apply to remedial statutes such as the MCPA. These statutes must be liberally construed to achieve their intended goals and in favor of the intended beneficiaries. *Putkamer v. Transamerica Ins. Corp. of America,* 454 Mich. 626, 563 NW2d 683 (1997). The MCPA has been so interpreted. *Forton v Lazar,* 239 Mich App 711, 715; 609 NW2d 850 (2000); *Price v. Long Realty, Inc,* 199 Mich.App 461, 471; 502 NW2d 337 (1993). In *Dix v American Banker's Life Assurance Company of Florida,* 429 Mich 410, 417; 415 NW2d 206 (1987), this Court stated that:

> The Consumer Protection Act was enacted to provide an enlarged remedy for consumers who are mulcted by deceptive business practices, and it specifically provides for the maintenance of class actions. This remedial provision of the Consumer Protection Act should be construed liberally to broaden the consumers' remedy, especially in situations involving consumer frauds affecting a large number of persons.

It necessarily follows that exemptions contained in remedial statutes such as the MCPA must be narrowly construed to give effect to the legislative intention of protecting the public from the prohibited conduct. *Rzepka v. Farm Estates, Inc.,* 83 Mich App 702, 269 NW2d 270 (1978).

The *Smith* reading of section 4(1)(a) is incompatible with the wording and intended purpose of the MCPA. It ignores the legislative intent of protecting consumers; in fact, it runs contrary to that intent. Rather than broadening "the consumers' remedy," it broadens the exemptions thereby eliminating the MCPA as a potential remedy for many consumers. Without

the protections of the MCPA, consumers will be subject to unfair or deceptive practices without a viable remedy.

Although the *Smith* Court disagrees with the Court of Appeals "common-sense reading" of Section 4(1)(a), it fails to provide any meaningful explanation as to why. Actually, *Smith's* interpretation runs contrary to "plain and ordinary" meaning of the statutory language. Section 4(1)(a) exempts "**[a]** transaction or conduct specifically authorized" by another statute. The statutory language is singular. Section 3(1), MCL 445.903(1), lists types of prohibited conduct. Under a plain meaning interpretation of section 4(1)(a), the inquiry would be whether the singular transaction or type of conduct at issue as being potentially in violation of one or more of the listed MCPA prohibitions is specifically authorized under another law. For example, if it were alleged that a motor vehicle repair facility charging more than the amount of a written estimate is in violation of certain sections of the MCPA, the inquiry would be **whether that transaction or conduct is specifically authorized under the MVSRA.** Instead of exempting singular transactions or conduct, the *Smith* reading exempts an entire industry's **transactions.**

The *Smith* interpretation also renders parts of the statute "surplusage or nugatory." For example, Section 21 of the act, MCL 445.921, gives the commissioner of insurance power to investigate potential violations of the MCPA. Under *Smith's* interpretation, it was the intention of the Legislature to exempt the entire insurance industry from coverage under the MCPA. If that interpretation were correct, and Amici maintain it is not, Section 21 would become "surplusage or nugatory," as no investigative authority would be necessary. If the *Smith* holding is expanded to other regulated industries additional sections of the act will become "surplusage or nugatory."[7]

In addition, the *Smith* reading of Section 4(1)(a) fails to make the MCPA a "harmonious whole"; it produces the contrary. A reading of the statute shows a clear intent to protect

consumers from unfair or deceptive practices. A "broad exemption" defeats that purpose creating disharmony within the statute.

Perhaps most obviously, *Smith's* reading of section 4(1)(a) violates the rules of construction regarding remedial statutes. *Smith's* interpretation broadens the exemption when the required construction would be a narrow interpretation giving effect to the legislative intent of protecting consumers. It does the opposite, putting consumers at risk. *Smith's* interpretation does not liberally construe the MCPA in a manner consistent with the clear goals of protecting consumers and eliminating unfair or deceptive practices. It is not an interpretation in favor of the intended beneficiaries—consumers—but is opposed to their interests.

Smith is inconsistent with the rules of statutory construction. It did not explain adequately, if at all, the reasons for its departure from those rules. It is unclear why the *Smith* Court reached the decision it did. The Court of Appeals in *Kekel* seemed to be acting as if the goal of the MCPA was more to protect regulated businesses than to protect consumers. However, reading a broad exemption into the state's premier consumer statute protects neither consumers nor honest businesses. Although it may seem counter-intuitive to some business people, consumer protection legislation is in the best interest of business. This concept will be considered next.

5. CONSUMER PROTECTION LEGISLATION IS GOOD FOR BUSINESS

It is axiomatic that protecting consumers from unfair or deceptive business practices is not only good for consumers; it is in the best interests of honest businesses and an efficient, competitive economy. In 2001, George A. Akerlof received a Nobel Prize in economics for his article: The Market for "Lemons": Quality Uncertainty and the Market Mechanism, 84 Quarterly Journal of Economics 488 (August 1970). The article examines the economic effect of

[7] See, eg, MCL 445.917, MCL 445.918, MCL445.919, MCL 445.920 as well as MCL 445.903(1)(e)(o) and (l).

dishonesty in the marketplace. Professor Akerlof discusses the negative effect of dishonesty on competition as follows:

> . . .There may be potential buyers of good quality products and there may be potential sellers of such products in the appropriate price range; however, the presence of people who wish to pawn bad wares as good wares tends to drive out the legitimate business. The cost of dishonesty, therefore, lies not only in the amount by which the purchaser is cheated; the cost also must include the loss incurred from driving legitimate business out of existence. *Id* at 495.

Providing consumers with remedies for unfair or deceptive practices not only helps eliminate such practices; it also allows legitimate businesses to prosper and facilitates the fair, efficient running of the economy.

This country has long recognized that unfair or deceptive trade practices affecting consumers also have an adverse effect on competition. The Federal Trade Commission (FTC) Act is a prime example. 15 USC 45, *et seq.* The act is designed to protect competition by eliminating unfair practices. It is also designed to protect consumers. The FTC can declare a practice unfair where "the act or practice causes or is likely to cause substantial injury to consumers." 15 USC 45(n). Most, if not all, unfair or deceptive trade practices listed in the MCPA have been addressed by the FTC.

Many federal consumer protection statutes clearly state an intention to both protect competition and consumers. For example, the Truth in Lending Act, 15 USC 1601, *et seq.*, explicitly states Congress' two-fold intent:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of

> credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices. 15 USC 1601(a).[8]

The Magnuson-Moss Warranty Act, 15 USC 2301, *et seq.*, also shows the blending of protecting competition by protecting consumers:

> In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. 15 USC 2302(a).

To the extent the business community may be opposed to consumer protection legislation, it is taking a short sighted, counterproductive view. Any additional expenses an honorable business might incur in the short run in order to comply with consumer protection legislation are more than offset by preventing competitors from using unfair or deceptive means to gain an unfair economic advantage. By creating a "broad exemption" to the MCPA, the *Smith* Court has made a decision that is not only detrimental to consumers but also to business. More unscrupulous merchants will engage in unfair or deceptive practices. More honest business people will be put at a competitive disadvantage unless they also adopt similar unfair or deceptive practices. The damage created by *Smith's* interpretation of the MCPA will go on and on like the ripples of a stone thrown in a lake. Again, this Court is urged to reject *Smith's* broad interpretation and return to the narrow exemption of *Diamond.*

---

[8] *See also Mourning v Family Publications Service, Inc*, 93 S Ct 1652; 411 US 356, 363 (Fla 1973).

B. IF THE COURT DOES NOT RETURN TO *DIAMOND'S* NARROW READING OF SECTION 4(1)(a); IT SHOULD LIMIT *SMITH'S* HOLDING TO THE INSURANCE INDUSTRY, OR AT MOST, SIMILARLY HIGHLY REGULATED BUSINESSES

The previous sections of this brief have demonstrated that *Smith's* reading of section 4(1)(a) creating a "broad exemption" to the MCPA runs contrary to the intended purpose of the act, the history of the act and the history of the section. It has also been shown that *Smith's* interpretation is inconsistent with *Diamond's* narrow construction, contrary to the rules of statutory interpretation and not in the best interests of either consumers or businesses. Based on that analysis, Amici have urged the Court to abandon *Smith* and return to *Diamond's* narrow interpretation of section 4(1)(a). In the event the Court is unwilling to take that course, Amici request the Court to adopt a narrow interpretation of *Smith,* applying an exemption only to the insurance industry, or at most, industries subject to similar extensive regulation.

Smith clearly leaves an open question regarding the breadth of the exemption created therein. The case contains an apparent incongruity. As set forth below, where at one point, the Court describes its interpretation of section 4(1)(a) as a "broad exemption," at another it indicates the exemption may have a narrow application.

In his opinion concurring in part and dissenting in part, Justice Cavanagh argues that under the majority interpretation virtually all regulated businesses would be exempt stating:

> Under the majority view, any activity that is *regulated* by a regulatory board or officer acting under statutory authority of this state or the United States, is specifically authorized. The majority effectively adopts the *Kekel* interpretation of the statute. 460 Mich at 480.

The majority counters Justice Cavanagh in footnote 12 at 466:

> We need not reach or otherwise address consumer transactions that are not before us because it is clear *in this case* that the sale of credit life insurance *is* "specifically authorized". . . under the Credit Insurance Act, which is administered by the insurance commissioner. . .**Thus, it is clear that, contrary to the position**

of the concurrence . . . insurance companies are not "like most businesses." (emphasis added)

Amici urge this Court to resolve this apparent incongruity by limiting the application of *Smith*. The *Smith* decision cites many statutes illustrating that virtually all aspects of the insurance industry are regulated. Insurance companies are indeed not like most businesses. As heretofore noted, broadening the MCPA exemption will lead to many ills. These include a diminishment of the public's right to be free from unfair or deceptive practices and the right of honest businesses to be free from unfair competition. If the Court is unwilling to adopt the narrow interpretation of *Diamond*, Amici urge the Court to minimize any damage by limiting the application of *Smith's* exemption to the insurance industry, or at most, to businesses subject to regulation similar to insurance, where every contract form must be made available to state regulators for review and acceptance.

RESQUEST FOR RELIEF

Amici ask this Honorable Court to reexamine its holding in *Smith* broadening the MCPA exemption contained in section 4(1)(a) and return to the narrow interpretation of *Diamond.* In the alternative, Amici request that the Court limit the scope of *Smith* to the insurance industry, or at most, those few businesses intensively regulated in a manner similar to the insurance industry.

Respectfully Submitted,

Gary M. Victor (P-24145)
Attorney for Amici Curiae
4928 Cole Blvd.
Ypsilanti Michigan 48197